No. 93-1455

Supreme Court, U.S.
FILED
MAY 10 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MARY HAYES, AS ADMINISTRATOR,
PARENT AND NEXT FRIEND OF
ROBERT HAYES, JR., DECEASED AND ERIC HAYES,
PETITIONER,

v.

DOUGLAS DYNAMICS, INC.,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION

John Benjamin Carroll
John Benjamin Carroll, P.C.
Suite 206
100 East Washington St.
Syracuse, NY 13202
(315) 474-5356

Counsel for Petitioner

CASILLAS PRESS, INC., 1717 K STREET, N.W., WASHINGTON, D.C. 20006

13 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

SUMMARY OF ARGUMENT 1

ARGUMENT 3

A. 3

THERE WERE NO LOWER COURT RULINGS REFERRING TO OR PLACING RELIANCE UPON SECTION 702 OF THE FEDERAL RULES OF EVIDENCE NOR WERE THERE ANY ADMISSIBILITY CLAIMS DETERMINED OR RELIED UPON BY THE LOWER COURT

B. 5

THE RECORD MAKES IT CLEAR THAT THE PLAINTIFF-PETITIONERS WERE NOT GIVEN AN OPPORTUNITY PRIOR TO FINAL DECISION AND JUDGMENT TO ANSWER THE ALTERNATIVE CAUSE OF ACCIDENT THEORY OF THE LOWER COURT AND THE OTHER NEWLY FOUND FINDINGS OF THE COURT

C. 6

THE LOWER COURTS DID IN FACT WEIGH THE EXPERT OPINION AND DID IN FACT DETERMINE EXPERT AND OTHER CREDIBILITY AND DID FAIL TO GRANT FAVORABLE INFERENCES TO THE PLAINTIFF AND THUS INVADED THE JURY FUNCTION AND THE SEVENTH AMENDMENT TO THE CONSTITUTION

Page

CONCLUSION 8

THIS CASE OFFERS AN OPPORTUNITY FOR THE COURT FOR THE FIRST TIME TO RULE UPON THE MEANING AND APPLICATION OF SECTION 705 OF THE FEDERAL RULES OF EVIDENCE TO SUMMARY JUDGMENT MOTIONS. ADDITIONALLY IT OFFERS SPECIFIC CONCRETE ISSUES OF EVIDENCE USE AND EVALUATION USEFUL TO DEFINE THE ROLE OF THE JUDICIARY. THE CIRCUITS ARE IN CONFLICT IN AN AREA INVOLVING HUNDREDS OF CASES ANNUALLY. ONLY THIS COURT CAN RESTORE THE CONGRESSIONALLY MANDATED UNIFORMITY TO THE FEDERAL SYSTEM.

TABLE OF AUTHORITIES

page

Daubert v. Merrill Dow Pharmaceutical Inc.,
113 S. Ct. 2786 (1993) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1455

MARY HAYES, AS ADMINISTRATOR,
PARENT AND NEXT FRIEND OF
ROBERT HAYES, JR., DECEASED AND ERIC HAYES,
PETITIONER,

v.

DOUGLAS DYNAMICS, INC.,
RESPONDENT.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION

SUMMARY OF ARGUMENT

Contrary to the assertions of the Defendant in its opposing brief, nowhere in either of the Lower Court decisions in this case is there any reference to Section 702 of the Federal Rules of Evidence (Pet. Cert. pgs 1, 16a). On the contrary the Lower Courts reviewed the Petitioners expert affidavits. It found them to prove the Respondents product, i.e. the lift mechanism was a possible cause but not a probable cause of injury (Pet. Cert. pg. 15a).

The Lower Court rulings solely cited Section 705 of the Federal Rules of Evidence (Pet. Cert. App. 8a). That Sec-

tion deals solely with expert opinion i.e. the use of admitted evidence, not admissibility. Admissibility is covered at Section 702 of the Federal Rules of Evidence.

The Lower Court specifically and squarely determined Section 705 of the Federal Rules of Evidence did not apply on a Summary Judgment motion (Pet. Cert. App. 8a).

Therefor this case raises squarely the issue of whether Section 705 applies on a summary judgment motion and if so what is its effect upon Rule 56 of the Federal Rules of Evidence.

In other Circuits Section 705 of the Federal Rules of Evidence has been held to preclude further inquiry into expert affidavits, and to require notice and opportunity to respond to alleged defects, such as the newly discovered alternate cause of injury from the metal pillar before Final Judgment (Pet. Cert. pg. 18 et. seq.).

The difference is significant because the Petitioner would have had its counter proof before the Circuit Court as a matter of right instead of having to hurdle its proof past the barriers of discretion that apply to post judgment motions to reopen or for reconsideration and thus loose the presence of this proof for appellate review.

In this case the Petitioners received their first notice of the court determined grounds for objection to the expert affidavits in the Final Decision and order. These events occurred simultaneously. There was no prior notice given the Petitioners although such notice had been requested. Post judgment additional proof motions were made and denied on a discretionary as is (Pet. Cert. pg. 6a) On Appeal the First Circuit held that the proffered post judgment proof was not before that Court since the Plaintiffs had no right to such relief except in the discretion of the District Court. (Pet. Cert. App. 6a)

In any other Circuit the result would have been different (Pet. Cert. pgs. 10-25).

Contrary to the assertions of the Defendant the Lower Courts did in fact weigh the evidence and determine expert credibility and did invade the expert field, a field for which they were not trained or qualified to second guess the experts. In so doing they supplanted the jury and invaded the Plaintiffs rights under the Seventh Amendment to the Constitution.

ARGUMENT

A.

THERE WERE NO LOWER COURT RULINGS REFERRING TO OR PLACING RELIANCE UPON SECTION 702 OF THE FEDERAL RULES OF EVIDENCE NOR WERE THERE ANY ADMISSIBILITY CLAIMS DETERMINED OR RELIED UPON BY THE LOWER COURT.

The Defendant Respondent asserts in its opposition to the motion for a Writ of Certiorari that as a legal and factual matter the case in the Lower Court was resolved on admissibility rulings. This assertion is in error. There are no court rulings on admissibility at all. No reference was made to Rule 702 of the Federal Rules of Evidence in either the District Court or the First Circuit Court of Appeals (Pet. Cert. pgs. 1a, 16a).

The decision was squarely placed upon Federal Rule 705 and Rule 56 of the Rules of Civil Procedure. (Pet. Cert. App. 8a). Rule 705 was found to not apply where Rule 56 was involved. There is no such language direct or indirect in the Section.

Thus both of the Lower Court decisions were solely based upon the courts view of the sufficiency of the evidence to prove causation not admissibility.

Therefore the reliance of the Defendant Respondent upon Section 702 of the Federal Rules of Evidence, and upon the decision of this court in *Daubert v. Merrill Dow Pharmaceutical Inc.*, 113 S. Ct. 2786 (1993) is misplaced.

In any event the *Daubert* decision (*supra*) does not hold that where expert methodology employed was standard for the expertise as was certified to in this record (Pet. Cert. App. 19a) and that fact is without opposition in the record that the court may nevertheless proceed to displace the jury and find the opinion is entitled to no weight because to the courts untrained eye pictures and other proof when evaluated by non expert judges indicates a contrary position exists. Further the *Daubert* decision dealt with Section 702 of the Federal Rules of Evidence dealing with admissibility of scientific and technical evidence, neither of which are issues in this case.

Further the *Daubert* decision (*supra*) reviewed the qualifications of the experts. In our case there is no issue but that the medical expert Dr. Ommaya is an internationally recognized expert in head trauma and the former head of the medical aspects of the National Highway Safety Commission. The Boston Medical Coroner works in trauma in a major city. Norris Shoemaker since 1955 has worked solely in highway automotive safety and is a nationally recognized expert, as is Nickolas Miller the accident reconstructionist. On their credentials alone the opinions of these experts are entitled to consideration.

There has been no prior Supreme Court ruling on the relationship between Rule 56 of the Rules of Civil Procedure and Section 705 of the Federal Rules of Evidence. The split in the Circuits created by this decision needs to be resolved by this court which is the only organ of government remaining to enforce the Congressional intent that there be uniformity in the application of evidence in the Lower Courts.

B.

THE RECORD MAKES IT CLEAR THAT THE PLAINTIFF-PETITIONERS WERE NOT GIVEN AN OPPORTUNITY PRIOR TO FINAL DECISION AND JUDGMENT TO ANSWER THE ALTERNATIVE CAUSE OF ACCIDENT THEORY OF THE LOWER COURT AND THE OTHER NEWLY FOUND FINDINGS OF THE COURT.

The District Court entered its decision and final judgment simultaneously before offering the Petitioner the opportunity to respond to the newly found reasons for dismissal. This procedure is deemed to be required by Section 705 of the Federal Rules of Evidence in other Circuits (Pet. Cert. Pg. 18a).

In this case the issue was not an abstract issue. Among the newly found matters and arguments advanced by the District Court was the argument first advanced in its final decision that there was an alternative cause of death of Robert Hayes Jr. not considered by the Plaintiffs experts, to wit death from a blow from a piece of metal found near the deceased. This was held to prohibit a finding of probability of death from the lift mechanism (Pet. App. pg. 24a, 25a). This was the first time such an alternative cause argument on such a basis had been advanced. It was not prior to that time advanced by the Respondent. The Lower court relied upon the existence of that cause in dismissing the action. (Pet. Cert. pg. 24a, 25a). It found that while the Petitioner had proved a possible cause, because of the existence of the alternative cause the plaintiff have not proven that is cause was a probable cause. (Pet. Cert. App. 14a).

The Plaintiff thus foreclosed from responding to the error in the courts analysis before final decision and judgment moved for the right to submit post judgment proof on this and other points of error or misunderstanding (Pet. Cert. App. 6a). These motions were denied in the Lower Court and appealed

to the First Circuit (Pet. Cert. App. 6a). There, instead of applying the rule in other Circuits, that Circuit affirmed the right of the Lower Court to render judgment before notice and opportunity to respond by the Plaintiff (Pet. Cert. App. 6a) The court did so expressly on the basis that such a right was not conferred upon the Petitioner under Federal Rule of Evidence Section 705 (Pet. Cert. App. 8a). It is the only Circuit in the United States to so Rule (Pet. Cert. pgs. 10-24) and this claim does not appear to be contested in the Respondents answering brief.

This issue has not yet been ruled upon by this Court. It is squarely presented by this record.

Thus the record belies the claims of the Respondent that there is no such issue in this case.

C.

THE LOWER COURTS DID IN FACT WEIGH THE EXPERT OPINION AND DID IN FACT DETERMINE THE EXPERT AND OTHER CREDIBILITY AND DID FAIL TO GRANT FAVORABLE INFERENCES TO THE PLAINTIFF AND THUS INVADED THE JURY FUNCTION AND THE SEVENTH AMENDMENT TO THE CONSTITUTION.

The Lower Court found that the scene police pictures presented a "mangled mass" of damage (Pet. Cert. App. 7a). It claimed the right to examine those pictures and determine whether the experts claims of discernment of wedge marks left by the lift mechanism in the pictures were observable to their lay eyes (Pet. Cert. App. 8a). Similarly the Lower Court claimed the right to examine the autopsy photographs of the deceased to see if a "U" shaped mark on the deceased scalp and brain identified as being present at the time of autopsy by the Boston Public Coroner's office was observable to their lay eyes (Pet. Cert. App. 13a).

Thus in these two instances the Lower Court without training in accident reconstruction, and without medical or pathology training by the exercise of lay judgment determined that these two vital pieces of evidence and the accompanying testimony were not to be given weight given them by the experts and that the experts were not credible. They thus invaded the jury's function and at the minimum made rulings that might better be deferred until trial when the witness is present and a colloquy between the witness and the Judge can enlighten the Judge and make more fair his ruling. Obviously, the First Circuit does not view a case dismissal as serious enough for such care.

In the case of the scene pictures there was no question even in the Lower Court's mind that the pictures showed damage (Pet. Cert. 7a). It was the location and character of the damage that was questioned. That required expert determination. In the case of the autopsy picture there are clear marks on the scalp and brain. It requires a medical education and pathology training to thereafter evaluate the pictures and testimony.

The Lower Court could not qualify in any court as an expert in the matters it attempted to resolve on its own expert unaided view. Yet that did not prevent the court from dismissing a mother's death action.

Similarly the Lower Court did not allow any inference to be drawn from such testimony despite the right of the Plaintiff to all inferences in its favor (Pet. Cert. App. 13a).

Thus contrary to the assertions of the Respondent the Lower Court did weigh the evidence and determine credibility and did substitute its own judgment for that of the experts and the jury, all in violation of the Seventh Amendment to the Constitution.

In addition the court failed to grant the Petitioner the simplest inferences in its favor. For example the truck driver who saw the accident testified that he knew where the lift mechanism was located, i.e. on the center of the truck. He saw where the center of the truck was located at the time of impact. The Lower Court failed to grant the Plaintiff the obvious inference that the lift mechanism impacted at the point where the center of the truck was located a point directly in line with the deceased seat because the witness did not actually see the impact of the lift mechanism. (Pet. Cert. 9a).

Likewise the Lower Court weighed and failed to give favorable inferences from the investigating officers testimony at the Grand Jury Hearing before this lawsuit was commenced. (Pet. Cert. pg. 34a)

CONCLUSION

THIS CASE OFFERS AN OPPORTUNITY FOR THE COURT FOR THE FIRST TIME TO RULE UPON THE MEANING AND APPLICATION OF SECTION 705 OF THE FEDERAL RULES OF EVIDENCE TO SUMMARY JUDGMENT MOTIONS, ADDITIONALLY IT OFFERS SPECIFIC CONCRETE ISSUES OF EVIDENCE USE AND EVALUATION USEFUL TO DEFINE THE ROLE OF THE JUDICIARY. THE CIRCUITS ARE IN CONFLICT IN AN AREA INVOLVING HUNDREDS OF CASES ANNUALLY. ONLY THIS COURT CAN RESTORE THE CONGRESSIONALLY MANDATED UNIFORMITY TO THE FEDERAL SYSTEM.

The First Circuit has in fact consciously made a policy decision to cut off product liability suits at the pass. That is the function of Congress not the Courts. It further determined to throw down the gauntlet to every other Circuit and this court. Without Certiorari the Congressional intent that the Rules be uniformly applied will not be achieved. The Congress

has not withdrawn Rule 705 from summary judgment motions. That has been engrafted upon that section by the First Circuit. Only this court has such a right. The issue raised has direct impact upon hundreds of pending and future law suits, and well merits the time of this court.

This case is useful to the court because it offers the court an opportunity to also define the role of the Judge in specific evaluation of specific evidence not only expert proof but other proof such as the picture evaluation that occurred herein all in one suit.

Respectfully submitted,

John Benjamin Carroll
John Benjamin Carroll, P.C.
100 East Washington Street
Syracuse, New York 13202
315-474-5356

Counsel for Petitioner